

FILED  
Court of Appeals  
Division II  
State of Washington

NO. 53935-7-II  
7/27/2020 1:24 PM  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT PATRICK MAYKIS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 18-1-00683-18

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BRIEF OF RESPONDENT

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CHAD M. ENRIGHT  
Prosecuting Attorney

JOHN L. CROSS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 328-1577

**SERVICE**

Jessica Constance Wolfe  
1511 3rd Ave Ste 701  
Seattle, Wa 98101-3647  
Email: jessica@washapp.org

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED July 27, 2020, Port Orchard, WA

*DS*  
**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**  
Office ID #91103 kcpa@co.kitsap.wa.us

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court abused its discretion in restricting the defense questioning of prospective jurors by not allowing a question that included the facts of the case?

2. Whether the trial court abused its discretion in allowing testimony of the victim's pre-incident brain surgery?

3. Whether the trial court abused its discretion in not allowing the victim to testify about Maykis's post-incident apology?

4. Whether the trial court erred by entering judgement that included a deadly weapon enhancement on a jury finding that the rock Maykis used to assault Mr. Brewster is a deadly weapon?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Robert Patrick Maykis was charged by information filed in Kitsap County Superior Court with malicious harassment. CP 1. The information was amended adding account of second degree assault. CP 11. A second amended information added a deadly weapon enhancement to each charge. CP 13-15.

The jury found Maykis guilty on both counts. CP 65. The jury also returned special verdicts on each count finding that Maykis was

armed with a deadly weapon. CP 66-67.

Maykis was sentenced to 30 months confinement. CP 70. A notice of appeal was timely filed. CP 79.

Additional procedural facts are given in the appropriate argument section.

## **B. FACTS**

Police responded to a call of an altercation at an apartment complex. RP 366. Earl Brewster, the victim, had been treated by medics. RP 366-67. Mr. Brewster was upset, complained of pain in his leg, and “visibly shaken.” RP 403.

A witness gave the police identification of the suspect (RP 368) and a picture of his vehicle. RP 369-70. Police the plate on the vehicle and got an address in the apartment building. RP 368-69. Police found that the vehicle, a black Jeep, had left the scene. RP 370.

A large rock was identified as used in the assault. RP 383. The rock was described by the officer as being the size of “two fists.” RP 406. He added that his two fists are approximately nine inches across. RP 409.

Mr. Brewster described the rock as the size of a “rugby ball.” RP 467 (bigger than a brick, RP 477). He was on his way home from volunteering at the Veteran’s Hospital when the incident occurred. RP

448. He took a sort-cut to get to his condo. RP 449. He needed to relieve himself and felt he would not make it to his condo. RP 450. Between two parked U-hauls, he unbuckled his pants and relieved himself. RP 450-51. Me. Brewster looked around and did not see anyone. RP 451.

Then, “this guy jumped out of the truck and went crazy. I mean, he literally went, you know.” RP 452. He was parked on the other side of a fence and alighted a van and “And he jumped out of it and he's screaming.” Id. He said ““What the fuck do you think you're doing, you black Obama motherfucker," shit like that.” RP 453. He threatened to kick Mr. Brewster's ass. Id. He called Mr. Brewster a “nigger” (Id.) more than once. RP 462.

Maykis's demeanor was very angry. RP 464. He kept approaching the fence between the two. RP 466. As Mr. Brewster moved to leave, backing a little bit, “I saw this rock leaving his hand, about the size of a rugby ball.” RP 467. Maykis's side of the fence was on higher ground than Mr. Brewster's side. Id. Mr. Brewster's head was below the fence line and could have been hit by the rock. RP 474. He watched the rock hit his knee; he believed it would have hit his head had he ducked. RP 468.

The rock caused lasting pain in Mr. Brewster's knee (RP 470) and left a permanent scar. RP 473.

### III. ARGUMENT

#### A. THE TRIAL COURT CORRECTLY LIMITED VOIR DIRE ALLOWING QUESTIONING ON RACIAL BIAS BUT NOT ALLOWING QUESTIONS ON AN ELEMENT OF THE STATE'S PROOF.

Maykis argues that the trial court erred in sustaining the state's objection to the defense use of the word "nigger" in voir dire. This claim is without merit because the trial court has discretion to control voir dire questioning, because Maykis was allowed his right to questioning on racial prejudice, and because the use of that word was evidence in the case.

CrR 6.4(b) provides that

A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

This process implicates a defendant's right to an unbiased and unprejudiced jury as guaranteed by the Sixth Amendment of the United States Constitution and article 1, sections 3 (due process) and 22 (impartial jury) of the Washington Constitution. *State v. Brown*, 141 Wn.2d 798, 825, 10 P.3d 977 (2000).

The trial court has discretion over the conduct of the process. *Brown*, 141 Wn.2d at 825; *State v. Frederikson*, 40 Wn. App. 749, 752, 700 P.2d 369 (1985) (“The trial court’s exercise of discretion is limited only by the need to assure a fair trial by an impartial jury.”). An appellant must make two showings: “absent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, a trial court’s ruling on the scope and content of voir dire will not be disturbed on appeal.” *Brown*, 141 Wn.2d at 826.

The *Brown* Court considered a claim that the trial court should have *sua sponte* questioned the jurors on race in an interracial murder case. The Court engaged an extensive review of United States Supreme Court authority on the issue. The *Brown* Court observed that

The United States Supreme Court has acknowledged “there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence[.]” However, the Court has also held “[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.”

141 Wn.2d at 827 (citation omitted; brackets by the Court). Further,

The United States Supreme Court has emphasized that “[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him.”

141 Wn.2d at 838 (bracket by the Court), *citing Ristaino v. Ross*, 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.ed.2d 258 (1976). The *Brown* Court found no abuse of discretion in the trial court’s failure to *sua sponte* question

prospective jurors on race. 141 Wn.2d at 839. The case clearly establishes Maykis's right to question prospective jurors on race issues in the present case.

The parties engaged a robust discussion of race during voir dire questioning. The prosecutor discussed race with the jurors for at least forty pages of transcript. RP, 7/23, 142-187. These discussions touched upon the primary issue of whether or not jurors would be unfair because of race or ethnicity. *See e.g.* RP, 7/23, 143. In turn, the defense discussed "hate crimes" with the jurors. RP, 7/23, 290. The defense discussed "offensive language." RP, 7/23, 294. Maykis's constitutional right to inquire on the issue of race under the circumstances was satisfied.

At that point, the prosecutor divined that counsel was about to use the offensive word and objected, arguing that asking about the word was like asking the prospective jurors for opinions on a piece of evidence. RP, 7/23, 295-96. The trial court reasoned that "it's very clear in the law that we're not supposed to get into the specific facts of what a particular case might be." RP, 7/24/19, 298. The trial court sustained the objection because "I don't think its appropriate to introduce a specific fact about this case in voir dire." RP, 7/23, 304.

Constitutional concerns aside

it is not "a function of the [voir dire] examination ... *to educate the*

*jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.”*

*Frederiksen*, 40 Wn. App. at 752(bracket by the Court) (emphasis added), quoting *People v. Williams*, 29 Cal.3d 392, 174 Cal.Rptr. 317, 325, 628 P.2d 869 (1981); accord *State v. Racus*, 7 Wn. App. 287, ¶63, 433 P.3d 830 (2019), review denied 193 Wn.2d 1014 (2019).

Maykis was allowed his due process right to explore racial bias during voir dire. After that, the trial court properly exercised its discretion in ruling that the defense question was “to educate the jury panel to the particular facts of the case.” The trial court ruled on tenable grounds. This issue fails.

#### **B. EVIDENCE OF THE VICTIM’S PHYSICAL CONDITION AT THE TIME OF THE ASSAULT WAS RELEVANT.**

Maykis next claims that his case was prejudiced by the trial court allowing the victim to testify about reconstructive surgery on his head that predated the assault. This claim is without merit because the danger to Mr. Brewster’s head was relevant to the questions of whether Maykis used the weapon used in a manner making it a deadly weapon and whether he was armed with deadly weapon for the purpose of the special verdict.

The standard of review on the trial court’s rulings admitting or denying evidence is abuse of discretion. *State v. DeVincentis*, 150 Wn.2d

11,17, 74 P.3d 119 (2003). “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for unreasonable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Further

A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices.

*State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal quotation marks and citations omitted); *accord State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 647, P.3d 45 (2017).

The context of Mr. Brewster’s remarks was his testimony about how he reacted to seeing a rock “the size of a rugby ball” thrown over the fence at him. RP 467. Mr. Brewster saw the rock leaving Maykis’s hand. *Id.* Mr. Brewster saw the rock hit his knee and believed that the rock would have hit his head if he had ducked. RP 468. The rock missed Mr. Brewster’s head because he was “going back” or moving away from the fence. RP 469. Mr. Brewster asserted his belief that the rock could have hit him in the head. RP 474.

The prosecutor asked Mr. Brewster whether he had had brain surgeries and he responded in the affirmative and that his skull was not

“fine” at the time. RP 475. The prosecutor asked Mr. Brewster to tell the jury about that. Id. After defense objection, Mr. Brewster said

A few months before -- well, several months before the incident, I just had a reconstructive surgery. It's just mainly plastic and things up there. Because I had a massive seizure some years back and I just got around to reconstructing it. And the surgeon said don't fall again or don't let anything hit it. This thing is not settled. Avoid at all costs getting hurt on your head. And then this guy launches a rock. So my instinct was to just move back. I would have took it to the chest and face before I let something hit me square in the head because that's where the projectile was going, man. I got my eye on it. I moved back.

RP 475. Mr. Brewster was describing his reaction to having a large rock launched over a fence at him and the reason for his reaction that led to the rock hitting him in the knee.<sup>1</sup>

The jury was instructed that in order to find second degree assault by deadly weapon the rock had to be a thing that “under the circumstances used” is “readily capable of causing death or substantial bodily harm.” CP 54, instruction 16. On the deadly weapon special verdict the jury was told that “a deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” CP 58, instruction 20.

As Mr. Brewster observed, Maykis “launched” the rock over a six-foot fence so situated that Mr. Brewster’s head was below the top of the

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<sup>1</sup> It should be noted that Mr. Brewster also testified that the “brain injury” affected his memory. RP 462.

fence and thus below the trajectory of the large rock. Under the circumstances that Maykis used the rock it could have impacted Mr. Brewster's head. These are circumstances of use under which the rock was "readily capable causing death or substantial bodily harm." The same is true of the special verdict question: in the manner it was used, the rock may well have "easily and readily caused death." In contrast, had Maykis tossed the rock only two feet off the ground to hit Mr. Brewster's leg these definitions would be difficult to meet.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The status of the rock as a deadly weapon was a fact of consequence in the case. The rock's ability to cause death by the manner of and under the circumstances that the rock was used was in issue. The existing injury to Mr. Brewster's head made it more likely that the rock would cause death. The head-injury evidence was relevant on the question of the potential for the rock to cause death.

**C. THE AFTER THE INCIDENT APOLOGY BY MAYKIS OFFERED THROUGH THE TESTIMONY OF MR. BREWSTER WAS NOT RELEVANT, WAS HEARSAY, AND WAS PROPERLY EXCLUDED.**

Maykis next claims that the trial court erred by not allowing him to elicit from Mr. Brewster that Maykis had apologized to him sometime after the incident. This claim is without merit because post-incident behavior is not relevant to a defendant's state of mind at the time of an assault and because as offered the statement sought was inadmissible hearsay. It is not claimed that the statement is not hearsay; the argument is that there are reasons that the statement is otherwise admissible.

As above, the standard of review on the trial court's rulings admitting or denying evidence is abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11,17, 74 P.3d 119 (2003). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for unreasonable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

The issue arose as noted above when Mr. Brewster, having been asked if he was sure of his identification of Maykis said "Oh, we've had a run-in or two since. Not violent or anything. Pleasant at the time." RP 480. The trial court sustained the state's objection to Maykis's attempt to elicit from Mr. Brewster that Maykis had apologized. RP 492.

The trial court ruled that the evidence was both irrelevant because there was not showing of how the alleged apology may have affected Mr. Brewster's testimony and the apology was hearsay; the state's objection was sustained. RP497-98. The defense offer of proof on the issue, wherein Mr. Brewster admitted that in subsequent contacts Maykis was "apologetic", failed to change the trial court's mind. RP 499-505. The trial court ruled that the apology was collateral as it happened after the incident and provided no evidence of witness bias. RP 504.

Defendants' apologies are admissible as proof of consciousness of guilt or as proof of acquiescence in the truth of an accusatory statement. *State v. Studebaker*, 67 Wn.2d 980, 985, 410 P.2d 913 (1966). The definition of hearsay excepts "other than [statements] made by the declarant while testifying." ER 801(c). Here, Maykis sought to elicit his statements from Mr. Brewster and thus the exception does not apply. Further, such statements when offered by the state for one of the above purposes are not hearsay because admissions by party-opponent. ER 801(d)(2).

The admission rule, in relevant part, provides that a statement is not hearsay if "[t]he statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity. . ." ER 801(d)(2). Here, the statement sought was Maykis's own

statement. However, Maykis did not offer his own statement “against a party” but offered it to support his own case. “Such out-of-court statements by a nontestifying party are admissible only if offered against, not in favor of, that party.” *State v. Larry*, 108 Wn. App. 894, 908, 34 P.3d 241 (2001) *review denied* 146 Wn.2d 1022 (2001), *disapproved on other grounds State v. Fisher*, 185 Wn.2d 836, 374 P.3d 1185 (2016).

This type of hearsay is sometimes called “self-serving” hearsay. *State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967 (1999). The *Finch* Court explained that

if an out-of-court admission by a party is self-serving, and in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule.

Id. Further,

The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-examination. This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence.

137 Wn.2d at 825.

Maykis begins by asserting error in exclusion of the apology because it was evidence “in support of” his defense and should not be excluded. Brief at 18. He argues that the apology evidence would support his defense theory. Brief at 21. In so doing, Maykis admits that the evidence was not “against a party opponent.” Moreover, the statement

was sought from Mr. Brewster; Maykis is the “nontestifying party” in the *State v. Larry* holding. Maykis’s statements were inadmissible hearsay under ER 801(d)(2).

Further, the argument that rule 801 is superseded by considerations of Maykis’s intent or malice also fails. In *State v. Stubsjoen*, 48 Wn. App. 139, 738 P.2d 306 (1987), Stubsjoen sought to introduce, through a witness, her own statements made in a phone call an hour and a half after the incident. 48 Wn. App. at 146. The trial court allowed testimony that the call occurred but not evidence of the content of the call. *Id.* The Court of Appeals affirmed, providing analysis directly applicable to the present case

While statements offered as circumstantial evidence of the declarant's state of mind are not hearsay, such statements must be relevant to be admissible. 5A *K. Tegland, Wash.Prac.* § 336 (2d ed. 1982). Jonsson's testimony would only have been relevant insofar as it might have corroborated Stubsjoen's contention that she did not intend to abduct the baby. However, the relevant state of mind was when she left the car with the baby in Federal Way, not her state of mind 1 ½ hours later when she was speaking on the telephone to Jonsson.

48 Wn. App. at 146. Here, too, the apology may be characterized as circumstantial evidence of state of mind but still fail relevance because Maykis’s statements, made at an undetermined time after the incident, do not address the relevant state of mind—the state of mind occurring at the time of the assault and racial harang.

Maykis claims that the statement, otherwise inadmissible as irrelevant and hearsay, is admissible because the state opened the door by Mr. Brewster's statement that he had had post-incident "run ins" with Maykis. An evidentiary door may open in two circumstances

- (1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and
- (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

*State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) quoting Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66–67 (5th ed.2007). Since the apology is otherwise inadmissible, Maykis offers it as rebuttal.

First, Mr. Brewster's full remarks included that during these "run ins" Maykis were pleasant and the meetings were not violent. This observation rebuts Maykis's argument that the "run ins" remark created the "implication that Mr. Maykis had harassed Mr. Brewster after the charged incident." Brief at 20. Maykis had his argument ready-made: there were subsequent contacts; there was no hostility or assaultive behavior involved; the contacts were pleasant.

Second, armed with the argument, further inquiry may have too widely opened the door. In the defense voir dire of Mr. Brewster on the

point, the question turned to Mr. Brewster's comfort level in seeing Maykis around. RP 501. In part, Mr. Brewster said "Let's move on. But you have to wave at me every day and act like we're buds because we're not. You hurt me, man." Id. Mr. Brewster described the situation as "So this guy blasts me with a rock and he's able to hang out on my property, talk to me at will." RP 500-01. Mr. Brewster thought Maykis's apologetic stance was because "he feels he is ashamed of himself, those kind of things." RP 500. The evidence received did not tend to rebut the supposed negative implication of the "run ins" remark. It served to underline it.

The trial court's correct rulings on relevance and hearsay did not prejudice Maykis's case. *See Falk v. Keene*, 53 Wn. App. 238, 249, 767 P.2d 576 (1989), *affirmed on different issue, Falk v. Keene Corp.*, 113 wn.2d 645, 782 P.2d 974 (1989).

Finally, Maykis claims that the apology was admissible as good character evidence. He claims that this after the fact apology proves his lack of racial motivation at the time of the incident. He claims that this apologetic episode evinces a pertinent trait of his character. ER 404(a)(1).

Again, the after-the-fact behavior does not inform the question of Maykis's malice or intent at the time of the incident. The difficulty is that it does not follow logically from a subsequent apology that the act

apologized for was not at the time done with malice or intent. “Evidence is relevant if a logical nexus exists between the evidence and the fact to be established.” *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999) *review denied* 138 Wn.2d 1014 (1999). Maykis’s apologetic character, even if shown by this single instance of conduct, is not relevant as it was not a “fact that is of consequence to the determination of the action.” ER 401.

The trial court was correct in the first instance in ruling that the apology testimony sought from Mr. Brewster was inadmissible because not relevant and hearsay. Maykis’s attempts to find abuse of discretion fail. There was no error in excluding Maykis’s out-of-court statements.

**D. A ROCK, DEPENDING ON THE MANNER IN WHICH IT IS USED, MEETS THE DEFINITION OF DEADLY WEAPON IN THE ENHANCEMENT STATUTE.**

Maykis next claims that that the rock used is not a deadly weapon under the statutory definition found in the deadly weapon enhancement statute. This claim is without merit because the statute is not ambiguous and a thing may meet the definition by the manner in which it is used not by virtue of its design and the specific list of items in the deadly weapon enhancement statute sufficiently relate to the general definition.

When interpreting a statute, courts look first to the statute's plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). “Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). “If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Id.*

First, the history of using rocks as weapons is obvious

Throwing of rocks or stones is one of the most ancient forms of ranged-weapon combat, with slings used to increase the range of such projectiles having been found among other weapons in the tomb of Tutankhamen, who died about 1325 BC.[1] In many places, rocks are readily available as weapons, more so than more sophisticated weapons. Because rocks are dense, hard objects, a forcefully thrown rock can do substantial damage to a target, particularly if the rock has sharp or jagged edges.

“Stonethrowing,” “History,R.”, [https://en.wikipedia.org/wiki/Stone\\_throwin](https://en.wikipedia.org/wiki/Stone_throwin)

g. Maykis takes the position that the statute is not broad enough to encompass the most primordial weapon known to humans.

The jury instruction and the statute provide that

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in

the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825 (second paragraph); CP 58, instruction 20.

The statute is not ambiguous. The plain language of the statute in fact includes throwing rocks—sling shots throw rocks. Thus Maykis is wrong that the examples section of the law does not include rocks. Thus *ejusdem generis* is satisfied since a rock throwing device certainly suggests that the throwing of rocks be included in the application of the more general definition in the first sentence of the statute. *See State v. Stockton*, 97 Wn.2d 528, 532, 647 P.2d 21 (1982) )general term need only “suggest items similar to those designated by the specific terms,” (emphasis added ). A rock, depending on use, is similar to a club or metal knuckles in that they all hand-held and are used to bludgeon a victim. *See State v. Ross*, 20 Wn. App. 448, 454, 580 P.2d 1110 (1978) (distinguishing motor vehicle by observing that the statute speaks of things that are “hand-held”). Further, the general considerations in the first sentence are easily applied to the present case.

As argued above, Maykis “launched” the rock over a six-foot fence so situated that Mr. Brewster’s head was below the top of the fence and thus below the trajectory of the large rock. From the manner the rock was

used it was “likely to produce or may easily and readily produce death.” This phrase is not ambiguous and resort to legislative intent to construe it is unnecessary.

Maykis misses the mark by equating the use of a thing (whether one calls it an “implement,” “device,” or “utensil”) to accomplish the task of inflicting substantial bodily injury or death with the design of the thing. A ten-inch screwdriver is designed to screw and unscrew screws. Under Maykis’s theory the screwdriver cannot be a deadly weapon because it was not so designed. But if a person picks up that screw driver and intentionally uses it to repeatedly stab another person, the stabber used “an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” RCW 9.94A.825; *See State v. Barragan*, 102 Wn. App. 754, 761-62, 9 P.3d 942 (2000) (pencil swung with force at victim is deadly weapon); *see also A.H. v. State*, 577 So.2d. 699, 700, (1991) (baseball-sized rock, thrown hard, “likely to produce death or great bodily harm” and therefore a deadly weapon).

A Florida case provides analysis very close to the present case. In *Saint-Fort v. State*, 222 So.3d 624 (2017) *review denied* 2017 WL 4160981, Fla., 2017, the issue considered was whether a large rock is a deadly weapon when used to threaten a victim with assault. In Florida

“dangerous” and “deadly” weapons are given the same meaning: “any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm.” 222 So.3d at 625. Florida courts consider “whether a weapon has been used in a manner likely to cause great bodily harm or death in determining whether a weapon is a dangerous weapon.” *Id.* The issue “is a question of fact to be determined by the jury from the evidence, taking into consideration its size, shape and material and the manner in which it was used or was capable of being used.” 222 So.3d at 626. The Court concluded that “[u]nder certain circumstances, a rock can be a dangerous or deadly weapon.” *Id.*

The *Saint-Fort* Court rejected the argument that the rock could not be a deadly weapon because not actually thrown. The manner used mattered: “Had the defendant thrown the rock in a manner that was not likely to cause death or great bodily harm, the rock could not be classified as a dangerous weapon.” 222 So.3d 627. But,

That is not what happened here. Instead, the defendant threatened to hit the guard over the head with a heavy object. He then went and found one, took aim, and retreated only when the guard drew his gun.

*Id.* Moreover, “The rock was entered into evidence, giving the jury the opportunity to assess its size and weight and whether it was capable of inflicting the great bodily harm that was threatened.” *Id.*

Similarly, Maykis armed himself with a heavy object and not only

threatened to but attempted to hit Mr. Brewster in the head with it. The manner in which Maykis launched the rock at Mr. Brewster was likely to cause death or great bodily harm.

Maykis does not say why the phrase “likely to produce or may easily and readily produce death” is ambiguous. He moves on to legislative intent and rules of construction. But there is no ambiguity in Maykis’s use of the rock to assault Mr. Brewster and no ambiguity that in doing so the rock likely could have caused death. The facts meet the unambiguous statutory language. There was no error.

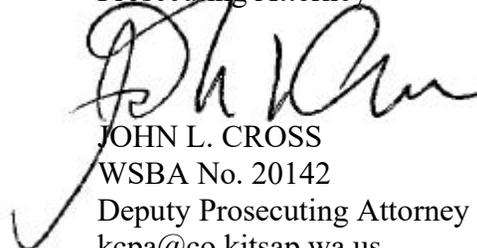
#### IV. CONCLUSION

For the foregoing reasons, Maykis’s conviction and sentence should be affirmed.

DATED July 27, 2020.

Respectfully submitted,

CHAD M. ENRIGHT  
Prosecuting Attorney



JOHN L. CROSS  
WSBA No. 20142  
Deputy Prosecuting Attorney  
kcpa@co.kitsap.wa.us

**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

**July 27, 2020 - 1:24 PM**

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**Appellate Court Case Number:** 53935-7  
**Appellate Court Case Title:** State of Washington, Respondent v. Robert Patrick Maykis, Appellant  
**Superior Court Case Number:** 18-1-00683-8

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